

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Detention of)	
Edward K. Smith,)	No. 60802-9-I
)	(consolidated with 62401-6-I)
Appellant.)	
-----)	DIVISION ONE
In the Matter of the Personal Restraint)	
of Edward K. Smith.)	UNPUBLISHED OPINION
)	
Petitioner.)	FILED: June 8, 2009
_____)	

AGID, J.—Edward Smith appeals the trial court’s order of commitment based on a jury’s finding that he is a sexually violent predator (SVP). He contends that because he was unlawfully incarcerated at the time the State filed its petition seeking to commit him as an SVP, the State had to prove that he committed a recent overt act and its failure to do so deprived him of due process. Because the lawfulness of Smith’s incarceration is not part of the criteria required to establish that he is an SVP and he was not yet released from confinement on a conviction for a sexually violent offense at the time the State filed its SVP petition, proof of a recent overt act was not required to support the petition. Accordingly, we affirm the order of commitment.

Smith also challenges the legality of his incarceration in a personal restraint

petition, arguing that Department of Corrections (DOC) did not have the authority to deny him early release based on his proposed living arrangements because the trial court did not impose as a condition of community placement that DOC preapprove his living arrangements. But this condition is a mandatory condition of community placement that is automatically imposed unless the court expressly waives it. The court's failure to check the box for this condition on the judgment and sentence does not amount to an express waiver of that condition, and we deny the personal restraint petition.

FACTS

On October 22, 1993, Edward Smith pled guilty to three counts of first degree child molestation. On December 6, 1993, the trial court sentenced him to 149 months' confinement on each count to be served concurrently and imposed two years of community placement with conditions. Among the conditions imposed were the following mandatory conditions:

- (a) The defendant shall report to and be available for contact with the assigned community corrections officer as directed;
- (b) The defendant shall work at department of corrections-approved education, employment, and/or community service;
- (c) The defendant shall not consume controlled substances except pursuant to lawfully issued prescriptions;
- (d) A defendant in community custody shall not unlawfully possess controlled substances; and
- (e) The defendant shall pay community placement fees as determined by the [D]epartment [of Corrections].

The court also imposed the following additional conditions:

- (g) (X) The defendant shall not have direct or indirect contact with [the victims].

. . . .

(k) (X) The defendant shall . . . [not have] contact with children under the age of 17 unless supervised by a responsible adult.^[1]

Also listed as an “addition[al]” condition was: “The residence location and living arrangements of the defendant shall be subject to the prior approval of the department.”

The space in front of this condition was left blank.

On June 15, 2003, Smith wrote to DOC and asked for confirmation that he did not need the DOC’s prior approval of his residence before he was released. In response, DOC informed him that he needed prior approval of his address before he could be released. DOC’s response also stated that he was subject to the mandatory provisions of RCW 9.9A.700 because he was in prison for crimes committed after the June 11, 1992 amendments to the Sentencing Reform Act of 1981, chapter 9.94A RCW. That statute made it a mandatory condition of community placement that sex offenders have their residence locations and living arrangements preapproved by DOC, unless the sentencing court waived the condition.² Smith then submitted a release plan with an address in Yucaipa, California, on November 24, 2003.

On December 22, 2003, DOC notified the State attorney general’s office that Smith should be considered for civil commitment as an SVP. DOC also informed the State that Smith’s maximum release date was January 23, 2006. Smith’s early release date was March 15, 2004, but on March 2, 2004, DOC denied his release plan citing the number of children living near his proposed residence as the basis for the denial.

On January 20, 2006, three days before Smith’s maximum release date, the State filed a petition under RCW 71.09 alleging that Smith was an SVP. As a result of

¹ Each of these conditions had an “x” marked in the space before the stated conditions.

² Former RCW 9.94A.120(8)(b)(vi) (1992).

the petition, on January 23, 2006, DOC released him to the custody of the Department of Social and Health Services. On April 19, 2006, the trial court entered an agreed order affirming probable cause for the SVP petition and ordering that he be held at the Special Commitment Center pending trial.

Before trial, Smith moved to dismiss the SVP petition, arguing that due process required dismissal because DOC unlawfully held him past his earned early release date. The trial court denied the motion, concluding that his incarceration had no bearing on the civil SVP proceedings. Smith sought discretionary review of the trial court's ruling in this court, which we denied.

Smith proceeded to trial, and the court instructed the jury that to establish that he was an SVP, the State had to prove the following elements beyond a reasonable doubt:

1. That Edward Smith has been convicted of a crime of sexual violence, namely three counts of Child Molestation in the First Degree;
2. That Edward Smith suffers from a mental abnormality (to - wit: Pedophilia) or a personality disorder which causes him serious difficulty controlling his sexually violent behavior; and
3. That the mental abnormality or personality disorder makes Edward Smith likely to commit predatory acts of sexual violence unless confined to a secure facility.

The jury found that Smith was a sexually violent predator, and the trial court ordered him committed.

DISCUSSION

I. Sexually Violent Predator Petition

To support a petition alleging that an offender is a sexually violent predator, the

State must prove beyond a reasonable doubt that the offender “would be likely to engage in predatory acts of sexual violence if not confined in a secure facility.”³ The State must also prove beyond a reasonable doubt that the offender committed a recent overt act showing that the offender is currently dangerous if, on the date the State filed the petition, the offender was living in the community after release from custody.⁴ But the State need not prove a recent overt act if the offender is currently incarcerated for a sexually violent offense or for an act that would itself qualify as a recent overt act when the petition is filed.⁵

Smith asserts that he was unlawfully incarcerated because the trial court did not order as a condition of his community placement that DOC approve his living arrangements and his release was denied based on his proposed residence.⁶ Thus, he contends that because he should have been released from confinement at the time the State filed the SVP petition, the State had to prove he committed a recent overt act and its failure to do so deprived him of due process. The State responds that because the trial court did not have jurisdiction to consider the legality of his incarceration, Smith’s due process claim is without basis. Alternatively, the State contends that the incarceration was not unlawful because the trial court did not affirmatively waive the community placement condition that DOC must preapprove his living arrangements upon release.⁷

³ RCW 71.09.060(1).

⁴ RCW 71.09.060(1).

⁵ RCW 71.09.030; In re Detention of Marshall, 156 Wn.2d 150, 157, 125 P.3d 111 (2005).

⁶ He also makes this argument in his personal restraint petition on the prior sex offenses for which he was incarcerated, which is consolidated with this appeal.

⁷ The State makes this argument in its response to the personal restraint petition.

Because the legality of Smith's incarceration is the basis for his due process claim, we first consider whether the trial court had jurisdiction to determine the lawfulness of the confinement. Division Two recently addressed this issue in In re Detention of Dudgeon and held that the trial court in an SVP case did not have jurisdiction to determine the lawfulness of the offender's detention for the prior criminal sex offenses.⁸ Like here, Dudgeon argued that because he was unlawfully detained beyond his early release date, the State was required to prove a recent overt act.

Division Two agreed with the State that the trial court lacked jurisdiction to consider the lawfulness of the detention, concluding that an SVP petition did not require that the State establish that the offender was lawfully incarcerated. As the court explained:

In reviewing the statutory scheme of chapter 71.09 RCW, and the alternatives available to an inmate to challenge unlawful incarceration, it is clear that the SVP court is not the proper venue to challenge whether the alleged SVP's incarceration was lawful. The SVP court simply determines whether the alleged SVP was incarcerated and whether the incarceration was for a sexually violent offense.^[9]

The court reiterated that "[t]he purpose of relieving the State of the burden of proving a recent overt act, when the offender has been continuously incarcerated since conviction, is that such a requirement would create an impossible burden for the State to meet."¹⁰ Dudgeon, like Smith, had been in continuous custody since his last conviction. The court also cited a recent opinion from Division Three, In re Detention of Keeney,¹¹ which held that the SVP statute merely requires that individual be in

⁸ 146 Wn. App. 216, 223, 189 P.3d 240 (2008), review denied 165 Wn.2d 1028 (2009).

⁹ Id. at 224.

¹⁰ Id. at 225 (alteration in original) (quoting In re Detention of Albrecht, 147 Wn.2d 1, 9, 51 P.3d 73 (2002)).

“custody” at the time of the commitment hearing and that “lawful custody” was not a prerequisite to a valid SVP petition.¹² The court then advised that Dudgeon “should have first exhausted all internal DOC processes to protest his alleged unlawful confinement” and then requested relief by filing a habeas corpus petition or a personal restraint petition.¹³

Smith argues that Dudgeon was wrongly decided and urges us not to apply it here. He contends that the holding in Dudgeon would leave individuals like him without any remedies for unlawful confinement because “the relatively short period between the unlawful confinement and the filing of the SVP petition often renders a personal restraint petition moot.” But as he asserts in his personal restraint petition and as is discussed below, an offender can seek relief from unlawful confinement that has already ended in a personal restraint petition if the offender demonstrates that the unlawful confinement had continuing effects, such as the filing of an SVP petition without proof of an overt act.

Additionally, we agree with Dudgeon that the analysis Smith urges would create the “impossible burden” for the State to prove a recent overt act because Smith has been continuously confined since his 1993 conviction. As In re Detention of Albrecht holds, the recent overt act requirement is triggered when the offender is released into the community and is then sanctioned for violating community placement.¹⁴ “After the offender has been released into the community, proof of a recent overt act is no longer

¹¹ 141 Wn. App. 318, 169 P.3d 852 (2007).

¹² Id. at 330-31.

¹³ 146 Wn. App. at 224.

¹⁴ 147 Wn.2d 1, 10, 51 P.3d 73 (2002).

an impossible burden for the State to meet,” and “due process requires a showing of current dangerousness.”¹⁵ Thus, Albrecht recognized that due process does not require the State to prove a recent overt when the alleged SVP has not been released into the community since his last conviction.¹⁶ Finally, even if the trial court found that his delayed release was unlawful, Smith cites no authority requiring dismissal of the SVP petition. Rather, in cases where DOC release policies or practices have violated due process, the remedy has been to direct DOC to change those policies or practices.¹⁷

Because the trial court lacked jurisdiction to consider the legality of his incarceration in the context of an SVP petition, we need not address the merits of Smith’s challenge to the incarceration in his direct appeal.

II. Personal Restraint Petition

In his personal restraint petition, Smith contends that although he has already been released from those convictions, he remains “restrained” because his unlawful incarceration resulted in the State’s filing an SVP petition against him that did not require proof that he committed a recent overt act. The State contends that the petition is moot because this court cannot provide effective relief for Smith’s challenge to DOC’s actions.

Under RAP 16.4, a petitioner may obtain relief from this court by filing a personal restraint petition demonstrating that the petitioner is under a “restraint” and the restraint is unlawful.¹⁸ A petitioner is under a “restraint” if the petitioner has limited freedom

¹⁵ Id.

¹⁶ Id.

¹⁷ In re Pers. Restraint of Liptrap, 127 Wn. App. 463, 111 P.3d 1227 (2005); In re Pers. Restraint of Dutcher, 114 Wn. App. 755, 766, 60 P.3d 635 (2002).

¹⁸ RAP 16.4(a).

because of a court decision in a civil or criminal proceeding, is confined, is subject to imminent confinement, or is under some other disability resulting from a judgment or sentence in a criminal case.¹⁹ “Restraint” also includes the continuing effects of an already-served unlawful confinement.²⁰ Here, Smith demonstrates that if the confinement was unlawful, it had continuing effects because it resulted in the filing of an SVP petition without proof of a recent overt act. He has therefore established that he is under a “restraint.”

Smith further contends that this restraint was unlawful under RAP 16.4(c) because it violated his due process rights under the federal and state constitutions. He argues that he had a liberty interest in his earned early release credits, and DOC’s unlawful denial of his release into community placement violated his due process rights.

Smith asserts the trial court waived the condition that DOC preapprove his postrelease living arrangements and DOC therefore did not have authority to deny his release based on his proposed living arrangements. Thus, he contends, he was unlawfully confined beyond his early release date.

Smith relies on In re Detention of Capello, where the court held that Capello’s restraint was unlawful because DOC did not have authority to impose a condition of his transfer to community custody that the trial court did not order.²¹ There, the trial court sentenced Capello to community placement following his release from prison for a

¹⁹ RAP 16.4(b).

²⁰ In re Pers. Restraint of Richardson, 100 Wn.2d 669, 670, 675 P.2d 209 (1983); see also In re Pers. Restraint of Powell, 92 Wn.2d 882, 887-88, 602 P.2d 711 (1979).

²¹ 106 Wn. App. 576, 24 P.3d 1074, review denied, 145 Wn.2d 1006 (2001).

serious violent sex offense. At that time, it was an optional condition of community placement that the offender have a living address approved by DOC before release.²² DOC recommended to the court that it impose this condition, but the court declined to do so.²³ When Capello requested a transfer to community custody, DOC denied the transfer because he did not have a preapproved address.²⁴ Capello filed a personal restraint petition arguing that DOC lacked authority to impose this condition on his transfer to community custody because the trial court did not impose it.²⁵ The court held that the restraint was unlawful because the trial court had the exclusive authority to impose community placement conditions and specifically declined to do so. As the court explained:

The statutory framework of RCW 9.94.120 evinces a legislative intent that the trial court, not DOC, has exclusive discretion to decide whether or not to waive the standard conditions enumerated in RCW 9.94A.120(8)(b), and whether or not to impose the special conditions enumerated in RCW 9.94A.120(8)(c).^[26]

In Capello, the court applied former RCW 9.94A.120(8) (1991), the law in effect at the time Capello's sentence was entered. That statute was amended in 1992 and made preapproval of a residence location and living arrangement a mandatory, rather than optional, condition of community placement for offenders convicted of a sex offense or serious violent offense, unless expressly waived by the trial court.²⁷ Because Smith was sentenced in 1993, the amended statute applies here. Thus, the

²² Id. at 579.

²³ Id.

²⁴ Id. at 579-80.

²⁵ Id.

²⁶ Id. at 583-84.

²⁷ Former RCW 9.94A.120(8)(b)(vi)(1992).

condition is mandatory and was automatically imposed unless Smith demonstrates that the trial court expressly waived it.

Smith argues that the trial court's failure to check the box and specifically impose this condition should have the same result as in Capello and be deemed a waiver of the condition. But while Capello held that "special" conditions are deemed waived if not imposed specifically by the sentencing court, the court also acknowledged that "standard" or mandatory conditions automatically apply to all community placement sentences unless specifically waived.²⁸ Here, the condition was mandatory and was therefore automatically imposed absent the court's express waiver. The confusion was that the judgment and sentence incorrectly listed the condition as an "additional," rather than mandatory, condition and was apparently an old sentencing form that had not been updated to reflect the change in the law. But leaving a box blank for a mandatory condition listed incorrectly on an outdated form does not amount to an express waiver of that condition, particularly where it is not apparent from the record that the court in fact considered the condition before rejecting it. Indeed, in Capello, in finding a waiver, the court found significant that the court considered the condition before rejecting it, noting that DOC specifically requested that the trial court impose the condition.²⁹

Smith also argues that in response to his challenges to DOC's living conditions requirements, DOC stated that it had the authority to impose that requirement, which it did not have. But the statement Smith quotes from DOC's response correctly notified Smith that this was a mandatory condition of community placement, stating: "You have

²⁸ 106 Wn. App. at 585 (noting that "standard" or mandatory conditions are "automatically imposed unless waived by the trial court").

²⁹ See id.

been sentenced to two years of community placement, *which requires you to have an approved residence prior to release* and the Department has the authority to impose that requirement.”³⁰ Thus, by this statement, DOC properly recognized that this was a mandatory condition that it was required to impose and reasonably interpreted the judgment and sentence as not requiring otherwise.

Smith has failed to demonstrate that the trial court affirmatively waived this mandatory condition and that DOC’s denial of his early release was therefore unlawful. Thus, Smith fails to establish that he was unlawfully restrained. Accordingly, we deny his personal restraint petition.

We affirm the order of commitment and deny the personal restraint petition.

Ajd, J.

WE CONCUR:

Cox, J.

Grosse, J

³⁰ (Emphasis added.)